

## **CHAPTER 5.0 - PROGRAMMATIC AGREEMENT GOVERNING HISTORIC REVIEW**

### **5.1 OVERVIEW**

SEA determined early in the EIS process that the construction and rehabilitation of the proposed and existing rail line had the potential, in certain areas, to result in significant adverse impacts to cultural resources. SEA's review disclosed that the project area, including both the area along DM&E's existing rail line in Minnesota and eastern and central South Dakota and new rail alignment in western South Dakota and eastern Wyoming, is likely to contain undisturbed cultural resources. If earthmoving activities to construct new rail right-of-way, construct sidings, or repair the existing rail bed were to occur, cultural resources would be at risk. Damage or destruction of significant archaeological sites or historic resources would be considered by SEA to be a significant impact. See Draft EIS, Volume IIIA, page 4.3-104. Volume IIIB, page 4.4-134-135.

For the Draft EIS, SEA conducted a thorough analysis of cultural resources, including literature reviews to determine the number of archaeological and historic sites located in the project area. Based on this review, SEA determined that it is very likely that significant archaeological resources would be adversely affected by the proposed construction and rehabilitation of the DM&E new and existing rail line. Under the regulations of the Advisory Council on Historic Preservation (ACHP), a Federal agency may negotiate a Programmatic Agreement when "the effects on historic properties are similar and repetitive or are multi-State or regional in scope" and "when effects on historic properties cannot be fully determined prior to approval of an undertaking." See 36 CFR 800.14(b)(1)(I) and (ii). Because the scope of the DM&E proposal spanned three states, involved numerous alternatives totaling over hundreds of miles in length, and limited access to some properties precluded ground survey work, SEA, in consultation with ACHP, determined that a Programmatic Agreement would provide the best

means of recording the terms and conditions agreed upon by the signatories to resolve the potential adverse effects to historic properties resulting from the proposed rail line extension and rehabilitation. Consequently, SEA began work on a Programmatic Agreement to comply with the Section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA).

In the spring of 1998, SEA began the process of identifying consulting parties and negotiating the process for identifying, assessing, and mitigating cultural resources to be set forth in the Programmatic Agreement. Work on the Programmatic Agreement continued for approximately four years, during which time SEA met with representatives of the cooperating agencies; State Historic Preservation Officers (SHPOs) from Minnesota, South Dakota, and Wyoming; Tribes; various others consulting parties; and the ACHP. SEA included the Programmatic Agreement in the Draft Environmental Impact Statement issued on September 27, 2000, received comments on the document, incorporated the comments, and drafted a Final Programmatic Agreement for signature in the fall of 2001. SEA included the Final Programmatic Agreement in the Final EIS, issued in November 2001, and circulated it to the appropriate parties for signature.

Despite circulating the Final Programmatic Agreement for signature, SEA did not receive signed copies of the document back from the cooperating agencies, the three SHPOs involved, and the ACHP. Rather, a number of the parties submitted additional comments on the Final Programmatic Agreement and proposed additional modifications to the document. When the Board issued its final decision approving DM&E's proposal in January of 2002, SEA was still in the process of negotiating with the signatories and consulting parties about the proposed modifications and did not have an executed (signed) Programmatic Agreement. During the litigation that followed issuance of the Board's 2002 Decision, SEA continued working with the relevant parties, eventually securing all the necessary signatures. On May 14, 2003, ACHP

signed the Programmatic Agreement and indicated to SEA that this constituted a “satisfactory resolution” (See Appendix D).

On judicial review of the Board’s 2002 Decision in Mid States, the court affirmed SEA’s Section 106 consultation process, finding that the Board had complied with its responsibilities to notify and solicit public comment on matters of historic preservation during the environmental review.<sup>1</sup> However, the court found that the Board had been premature in authorizing DM&E to construct its proposed rail line before obtaining consensus on the terms of the Programmatic Agreement. The court stated:

*The ACHP’s regulations, when read in their entirety, thus permit an agency to defer completion of the NHPA process until after the NEPA process has run its course (and the environmentally preferred alternatives chosen), but require that NHPA issues be resolved by the time that the license is issued.*

Prior to oral argument before the court in Mid States on June 11, 2003, the Board submitted a letter to the court informing it that SEA had successfully executed the Programmatic Agreement on May 14, 2003. The court, however, did not take note of the signed Programmatic Agreement and, in Mid States, emphasized to the Board the need for a Programmatic Agreement to be executed before issuance of a license.

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<sup>1</sup> Mid States, 345 F.3d at 554.

## **5.2 CONCLUSIONS**

SEA conducted a thorough and extensive evaluation and assessment of the potential impacts to cultural resources associated with the proposed rail line construction and rehabilitation during the EIS process. SEA determined that significant impacts to cultural resources would result from the construction and rehabilitation along the proposed new rail line and the existing DM&E main line. The court upheld SEA's approach but indicated that SEA should have secured an executed Programmatic Agreement before the Board issued its license. By executing the Final Programmatic Agreement, however, SEA has addressed the concerns of the court.